UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

In re:

Case No. 96-896
Stockbroker Liquidation Under The Securities Investor Protection Act Of 1970

OLD NAPLES SECURITIES, INC.,
Debtor /

SECURITIES INVESTOR PROTECTION CORPORATION,

Applicant,

v.

OLD NAPLES SECURITIES, INC.,

Defendant. /

THEODORE H. FOCHT, TRUSTEE,

Plaintiff,

v. Adv. Proc. No. 98-468

DEAN MCDERMOTT; STEPHEN COMPOS, and COMPOS-MCDERMOTT SECURITIES, INC.,

Defendants. /

ORDER ON MOTIONS FOR SUMMARY JUDGMENT
(Doc. No. 99 and Doc. No. 103)

THE MATTERS before this Court are two Motions for Summary Judgment filled in the above captioned adversary proceeding. The first Motion is filed by the Plaintiff Theodore Focht as Trustee against Defendants Dean P. McDermott and Compos-McDermott Securities, Inc. (Doc. No. 99). The other Motion is filed by the three defendants named in the adversary proceeding, Dean McDermott (McDermott), Stephen Compos (Compos), and Compos-McDermott Securities Inc. (CMSI) (Doc. No. 103).

This Complaint was filed by Theodore Focht (Trustee) for the estate of Old Naples Securities, Inc., (Debtor) pursuant to the Securities Investors Protection Act of 1970, as amended, 15 U.S.C. § 78aaa, et. seq. (1994) (SIPA).

The Motion for Summary Judgment filed by the Trustee addresses Counts III, IV, V, VI, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI and XXVII of his twenty-four Count Complaint. The Trustee previously sued Shafer Money Management, Inc., and Stephen Compos and obtained a Final Judgment by Default against both of them. Thus, the Trustee's Motion is specifically directed only against the two Defendants. It is the Trustee's contention that there are no genuine issues of material fact and, based on the same, he is entitled to a judgment in his favor as a matter of law.

In due course, the Defendants McDermott and CMSI filed their Response in Opposition to Trustee's Motion for Summary Final Judgment (Doc. No. 104), and also filed a Motion for Summary Final Judgment and/or Partial Summary Judgment (Doc. No. 103). The Defendants, in their eighteen-page Response, set forth their bases for the denial of the Trustee's Motion. Essentially, the Defendants contend, among other things, that (1) the Trustee's statement of "undisputed facts" is misleading; (2) there are disputed issues of fact as to the Trustee's fraudulent transfer claim; (3) there are disputed issues of fact of an intent to defraud; (4) that the Defendants have a valid defense to the Section 548(c) voidable preference claim of the Trustee; (5) there are disputed issues of material fact as to the Trustee's State Law based claims; (6) there are disputed material facts concerning the breach of fiduciary duty claims; and (7) there are disputed issues of fact concerning causation and damages.

In addition, it is the contention of the Defendants that the Trustee failed to prove; (1) constructive fraud claims or a constructive trust; (2) the claim based on 11 U.S.C. §544(b); and (3) his claim based on 11 U.S.C. §547 as a matter of law. Lastly, the Defendants contend that based on their affirmative defenses plead, the Trustee's Motion must fail as a matter of law, because the affirmative defenses create genuine issues of material facts.

In order to place the issues in an understandable focus, a brief summary of the factual background of this litigation and the connections between Old Naples Securities, McDermott, Campos, CMSI, the role of the Trustee in this litigation, and the claims relevant to the two Motions under consideration should be helpful.

The Debtor was at the time relevant a securities broker-dealer registered with the SEC and a member of NASD and SIPC. The Debtor acted as an "introducing broker," and as such, did not have a seat on the national or regional stock exchange. For the reasons stated above, the Debtor was required to contract for the execution and clearing of securities trades through a "clearinghouse." The Debtor used Howe-Barnes Investment, Inc. for the purpose of a clearinghouse. (Composite Ex. 1; Ex. 2 at 149).

The operation of the Debtor was subject to the regulations set forth by a Statement of Operations and the Supervisory Procedure Manual (ONS Manual). The Debtor required its representatives to abide by the terms of the Statement of Operations and both McDermott and Compos, and the co-owner and Executive Vice-President agreed to follow the procedures required by the ONS Manual.

McDermott and Compos formed CMSI in 1992, which operated as a full service discount brokerage firm. At the time of the transactions which are relevant to the matter under consideration, McDermott had more than nine years of experience trading in municipal bonds on behalf of individual and institutional investors.

McDermott and James Zimmerman, who was the President of the Debtor, had a long-standing friendly relationship. In 1992, McDermott and Compos transferred their broker's licenses to the Debtor. (Ex. 11). As representatives, both signed a Registered Representative Agreement with the Debtor. The Agreement governed the commissions that could be earned on municipal bonds trades. (Ex. 2 at 178-79; Ex. 12). McDermott became the head of the branch office of the Debtor and operated out of the office of CMSI, which is located in Bethlehem, Pennsylvania. (Ex.7 at COMP 836).

On March 15, 1996, McDermott wrote a letter which was addressed to Dr. A. Landis Brackbill. Dr. Brackbill is the County Executive with the Northampton County Courthouse located in Easton, Pennsylvania. McDermott stated in his letter that Compos-McDermott Securities, Inc., was an affiliate of Old Naples Securities, Inc. (Debtor's Ex. 13). This record is devoid of any evidence that either McDermott or Compos were ever stockholders, directors, or officers of the Debtor or that CMSI ever merged with the Debtor.

The municipal bond sale program mushroomed and the Bethlehem office of the Debtor generated a substantial amount of business. However, when the parties began their eighth transactions which were supposed to settle in May 1996, seventeen investors from the Bethlehem Branch invested funds, including McDermott, Compos, and CMSI. (Ex. 18). In June or July 1996, McDermott went to the Debtors office in Naples, Florida. McDermott became concerned when the transaction did not settle in May 1996, as promised, and all the Bethlehem investors including McDermott and Compos wanted to get the return on the investments as promised. McDermott received eight checks from Zimmerman and McDermott used these checks to pay off four of his clients, one of which was Compos.

Because of the large scale embezzlement scheme by Zimmerman, the entire operation of the Debtor collapsed due to lack of funds and ultimately ended up in a stockholders liquidation proceeding, in which Focht was appointed as Trustee representing SIPC. SIPC is the entity which was responsible for compensating the victims who qualified to be treated as maintaining "customer accounts" with Old Naples Securities, Inc. Basically, these are the historical facts, which furnished the backdrop for the claims asserted by the Trustee in his Complaint.

The following counts are relevant to the Motions under consideration and they are as follows.

COUNT III and IV
[Fraudulent Transfer]

The Trustee in his Amended Complaint asserts in Count III that McDermott received certain payments as interest on his investments totaling $91,040.00 which, according to the Trustee, was voidable as a fraudulent transfer pursuant to 11 U.S.C. § 548(a)(1)(A). The Trustee also alleges a claim against McDermott in Count IV of his Complaint in which the Trustee seeks to recover an identical amount but on a different theory based on the alleged fraudulent transfers pursuant to 11 U.S.C. § 548(a)(1)(B).

COUNT V and VI
[Fraudulent Transfer]

The claim in Count V is asserted against CMSI and seeks to recover the total amount of $164,150.00 which, according to the Trustee, is a fraudulent transfer by virtue of 11 U.S.C. § 548(a)(1)(A), therefore, voidable. The claim against CMSI in Count VI also deals with identical payments or fraudulent transfers charged in this particular Count, but it is based on 11 U.S.C.

§ 548(a)(1)(B).

COUNT XI
[Fraudulent Transfer, 11 U.S.C. § 544(b) and FLA. STAT. § 726.105 (1)(a) -McDermott]

The claim in Count XI is asserted against McDermott, and based on allegations that the Debtor paid to McDermott the total amount of $115,040.00 which, according to the Trustee, is a voidable fraudulent transfer pursuant to 11 U.S.C. § 544(b) and FLA. STAT. §§ 726. 105(1)(a) and 736.109.

COUNT XII
[Fraudulent Transfer, 11 U.S.C. § 544(b) and FLA. STAT. § 726.105(1)(b)(1) – McDermott]

The claim in Count XII seeks to recover the identical amount in Count XI as proceeds of a fraudulent transfer, but on a different theory and claims to be based on 11 U.S.C. § 544(b) and FLA. STAT. § 726.105(1)(b)(1).

COUNT XIII
[Fraudulent Transfer, 11 U.S.C. § 544(b) and FLA. STAT. § 726.105(1)(b)(2) – McDermott]

The claim in Count XIII is, again, a claim against McDermott and seeks to recover the identical amounts claimed in Counts XI and XII and is based on 11 U.S.C. § 544(b) and FLA. STAT. § 726.105(1)(b)(2).

COUNT XV
[Fraudulent Transfer, 11 U.S.C. § 544(b) and FLA. STAT. § 726.105(1)(a) – CMSI]

The claim in Count XV is against CMSI and seeks to recover the amount of $199,310.00 as proceeds of an alleged fraudulent transfer, thus voidable under 11 U.S.C. § 544(b) and FLA. STAT. § 726.105(1)(a).

COUNT XVI
[Fraudulent Transfer, 11 U.S.C. § 544(b) and FLA. STAT. § 726.105(1)(a) – CMSI]

The claim in Count XVI seeks to recover the identical amount but on a different theory and is based on 11 U.S.C. §§ 544(b) and 550 of the Bankruptcy Code and FLA. STAT. §§ 726.105(1)(b)(1) and 726.109.

COUNT XVII
[Fraudulent Transfer, 11 U.S.C. § 544(b) and FLA. STAT. § 726.105(1)(b)(2) – CMSI]

The Trustee in Count XVII seeks to recover the amount identical in Counts XV and XVI on the theory that these payments are voidable as fraudulent transfers pursuit to 11 U.S.C. § 544(b) and FLA. STAT. § 726.105(1)(b)(2).

COUNT XVIII
[Fraudulent Transfer, 11 U.S.C. § 544(b) and FLA. STAT. § 726.105(1) – CMSI]

The claim in Count XVIII seeks to recover the same amount as the previous three counts based on 11 U.S.C. §§ 544(b) and 550 of the Bankruptcy Code, and FLA. STAT. § 726.106(1).

COUNT XX
[Preferences, 11 U.S.C. § 547(b) – McDermott]

Count XX is a claim asserted against McDermott and is based on the allegation that McDermott received the amount $91,040.00, which is recoverable as a voidable preference pursuant to 11 U.S.C. §547(b).

COUNT XXI
[Preferences, 11 U.S.C. § 547 (b) – CMSI]

Count XXI is a voidable preference claim against CMSI based on 11 U.S.C. §§ 547 and 550 of the Bankruptcy Code and seeks to recover the sum of $164,150.00 as an insider preference.

COUNT XXII
[Negligence – Compos, McDermott and CMSI]

The claim in Count XXII is, in fact, against Campos, McDermott and CMSI without separating a

claim against each. The claim is based on the allegations that the Defendants were guilty of negligence, and as a result, claimants were damaged.

COUNT XXIII
[Breach of Fiduciary Duty of Care – Compos, McDermott and CMSI]

The claim in Count XXIII is asserted against Compos, McDermott and CMSI and seeks damages based on allegations of breach of fiduciary duty of care to the Compos and/or McDermott Claimants, pursuant to a Ponzi Scheme.

COUNT XXIV
[Breach of Fiduciary Duty of Loyalty – Compos, McDermott and CMSI]

The claim in Count XXIV is based on the Defendants' breach of fiduciary duty of loyalty owed to the Compos and/or McDermott Claimants. Thus, the Trustee alleges the Defendants owed a fiduciary duty to the Claimants, and their acts and/or omission in dealing with the clients of the Debtor contributed to the harm to the claimants. As a result, the claimants were damaged, and CMSI is vicariously liable for the actions and conducts of its agents.

The Trustee's Summary Judgment under consideration is addressed to the following Counts in the Complaint:

1) Count III [Fraudulent Transfer, 11 U.S.C. § 548(a)(1)(A) --McDermott];

2) Count V [Fraudulent Transfer, 11 U.S.C. § 548(a)(1)(A) -- CMSI];

3) Count IV [Fraudulent Transfer, 11 U.S.C. § 548(a)(1)(B) -- McDermott];

4) Count VI [Fraudulent Transfer, 11 .S.C. § 548(a)(1)(B) – CMSI];

5) Count XI [Fraudulent Transfer, 11 U.S.B § 544(b) and FLA. STAT. § 726.105(1)(a) – McDermott];

6) Count XV [Fraudulent Transfer, 11 U.S.B § 544(b) and FLA. STAT. § 726.105(1)(a) – CMSI];

7) Count XII [Fraudulent Transfer, 11 U.S.B. § 544(b) and FLA. STAT. § 726.105(1)(b)(1) – McDermott];

8) Count XVI [Fraudulent Transfer, 11 U.S.B. § 544(b) and FLA. STAT. § 726.105(1)(b)(1) – CMSI];

9) Count XIII [Fraudulent Transfer, 11 U.S.B. § 544(b) and FLA. STAT. § 726.105(1)(b)(2) – McDermott];

10) Count XVII [Fraudulent Transfer, 11 U.S.B. § 544(b) and FLA. STAT. § 726.105(1)(b)(2) – CMSI];

11) Count XIV [Fraudulent Transfer, 11 U.S.B. § 544(b) and FLA. STAT. § 726.106(1) – McDermott];

12) Count XVIII [Fraudulent Transfer, 11 U.S.B. § 544(b) and FLA. STAT. § 726.106(1)(b) – McDermott].

In due course, both McDermott and CMSI filed their Answers coupled with numerous Affirmative Defenses. Their Answers contain some general denials, some denials due to lack of knowledge, and some admissions.

First Affirmative Defense

The Defendants in their first affirmative defense contend that this Court lacks in personam jurisdiction over the Defendants.

Second Affirmative Defense

In their second affirmative defense, the Defendant's assert that venue is improper.

Third Affirmative Defense

The third affirmative defense is based on the contention that the Trustee fails to state a claim for which Summary Judgment can be granted. In addition, the Defendants contend that the Florida fraudulent conveyance statutes cited in the Amended Complaint do not apply to these Defendants under choice of law and other principles.

Fourth Affirmative Defense

The fourth affirmative defense is based on the contention that this Court lacks subject matter

jurisdiction of the claims advanced in the Trustee's Amended Complaint.

Fifth Affirmative Defense

The fifth affirmative defense is based on the contention that the Trustee lacks standing to pursue all the claims, particularly those which are a derivative of the customers of the Debtor who have not authorized the Trustee to pursue any such claims.

Sixth Affirmative Defense

The sixth affirmative defense is based on the contention that all claims for securities law violations or fraudulent transfer claims against the Defendants fail as a matter of fact and law because the Defendants did not have the requisite or fraudulent intent, disregard, or lack of due care to hinder creditors.

Seventh Affirmative Defense

In their seventh affirmative defense the Defendants contend that to the extent any of the claims of the Trustee are predicated upon a theory of negligence, the Defendants' fault should be reduced by a percentage of comparative fault of the Debtor and its principals and, vicariously, the Trustee, as well as non-parties who are at fault.

Eighth Affirmative Defense

The eighth affirmative defense is based on the contention that the actions taken by the Defendants were at the directions of the principal and supervisor of the Debtor.

Ninth Affirmative Defense

The ninth affirmative defense states that all claims of preferential transfers fail as a matter of law and fact because the transactions took place either in the ordinary course of business or were involved in a contemporaneous exchange for new or other value.

Tenth Affirmative Defense

In their tenth affirmative defense, the Defendants contend that claims for bailment (sic) failed as a matter of law and fact.

Eleventh Affirmative Defense

The Defendants in their eleventh affirmative defense claim that they are entitled to a set-off for monies they lost in a fraudulent scheme perpetrated by the Debtor.

Twelfth Affirmative Defense

In the twelfth affirmative defense, the Defendant CMSI asserts that CMSI should not be held liable for any of the claims as it was not an agent of the Debtor but, instead, a customer of the Debtor.

Thirteenth Affirmative Defense

The thirteenth affirmative defense is based on a contention that, to the extent any advanced funds were loans, the Debtor breached such loan agreements.

Fourteenth Affirmative Defense

In this affirmative defense, the Defendants contend they should be limited to successful claims for customer status for the Defendants' clients, out of which only Kathleen Kovacs, or others, were determined to be customers of the Debtor.

Fifteenth Affirmative Defense

In their fifteenth affirmative defense the Defendants contend that this Court lacks subject matter jurisdiction to the extent the claims are all non-core claims.

Sixteenth Affirmative Defense

The sixteenth affirmative defense is based on the doctrine of estoppel against McDermott by virtue of the underlined SEC proceedings and SIPA customer litigations.

Seventeenth Affirmative Defense

In their seventeenth affirmative defense, the Defendants contend that the Debtor is collaterally estopped, or barred by principles of res judicata and/or judicial estoppel and/or collateral estoppel from pursuing the claims against these Defendants.

Eighteenth Affirmative Defense

The Defendants, in their eighteenth affirmative defense, contend that all claims based on state law fraudulent transfer claims fail as a matter of fact and law because the elements for such claims are absent in this case, and there is no fraudulent intent or scientor by either Defendant.

Nineteenth Affirmative Defense

In the nineteenth affirmative defense the Defendants contend that these claims must fail as a matter of fact and law because of the Debtor's unclean hands and perpetrating a fraudulent scheme.

Twentieth Affirmative Defense

The twentieth affirmative defense states that the Trustee improperly joined or combined distinct parties and claims in one proceeding, and the Trustee failed to join indispensable parties to the action.

Twenty-First Affirmative Defense

In the twenty-first affirmative defense, it is the contention of the Defendants that the Debtor is estopped from or has waived the claims in the Complaint by not pursing litigation against Zimmerman, the perpetrator of a fraudulent scheme.

Twenty-Second Affirmative Defense

In the twenty-second affirmative defense the Defendants contend that the Debtor failed to litigate damages by needlessly litigating legitimate customer claims and failing to proceed against Zimmerman.

Twenty-Third Affirmative Defense

In the twenty-third affirmative defense, the Defendants contend that the claim for conspiracy failed as a matter of law.

Twenty-Fourth Affirmative Defense

In the twenty-fourth affirmative defense, the Defendants contend that all claims based on breach of fiduciary duty, negligence, or conspiracy are precluded by an economic lawsuit.

Twenty-Fifth Affirmative Defense

In the last affirmative defense, the Defendants contend that they owed no duty under the law to the Debtor or to the Trustee in all transactions if any were at "arms length," or were a result of breach of trust or fiduciary duty or fraud by the Debtor or its principals.

AFFIRMATIVE DEFENSES

Affirmative defenses are defined by the Federal Rule of Civil Procedure (8)(c), as adopted by the Federal Rule of Bankruptcy Procedure 7008.

Rule (8)(c) Affirmative Defenses, provides in relevant part:

> "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and other matters constituting an avoidance or affirmative defense."

Even a cursory reading of this Rule leaves no doubt that all of the pleadings identified by the Defendants as affirmative defenses, with some exceptions, are not affirmative defenses. Only the following: 1) estoppel, 2) res judicata, 3) judicial estoppel are affirmative defenses within the Rule.

The claims set forth in Counts XX and XXI; seek recovery from McDermott in the sum of $91,040.00 and from CMSI in the sum of $164,150.00 respectively, as voidable preferences under Section 547(b) (Insider Preferences). This record leaves no doubt that both transfers occurred outside the ninety (90) day period but within one year from the date of the commencement of the case. The problem with these claims is that neither McDermott or CMSI were "insiders" as defined under Section 101(31)(A).

Section 101(31)(A) of the Code defines the term insider:

> (31)"insider"includes
> A. if the debtor is an individual–
> (i) relative of the debtor or of a general partner of the debtor;
> (ii) partnership in which the debtor is a general partner
> (iii) general partner of the debtor; or

(iv) corporation of which the debtor is a director, officer, or person in control."

Concerning the claim that McDermott was an insider, the clear meaning of this section leaves no doubt that McDermott does not fit in any of the specific categories as set forth above. Although it might be contended that the definition of this Section of an insider is merely illustrative and not exhaustive, there is nothing in this record which warrants the conclusion that Mc Dermott exercised any control whatsoever over the affairs of the Debtor. Furthermore, this Court is not familiar with the concept of non-statutory insider and, as such, the concept is not recognized in bankruptcy. Assuming without admitting that this Court should consider this concept, even in cases where this concept is mentioned, this Court considers the closeness of the relationship between the Debtor and the transferee, and whether transactions between the transferee and the Debtor were conducted at arm's length. Winick v. Daddy's Money of Clearwater, Inc. (In re Daddy's Money of Clearwater, Inc. 187 B.R. 750, 754 (M.D. Fla. 1995); Hirsch v. Tarricone (In re A. Tarricone, Inc.), 286 B.R. 256, 262 (Bankr. S.D.N.Y 2002).

However, concerning the claim that CMSI was an affiliate of the Debtor, this contention has some support by this record, although only by a self-serving statement of McDermott directed at a prospective investor. (See Trustee's Exhibit 12). However, considering the definition of the term "affiliate" in Section 101(2) of the Code, it is clearly not within the meaning of this Section for the following reasons. The term "affiliate" is defined as an entity that directly or indirectly owns controls or holds, with power to vote, 20 percent or more of the outstanding voting securities of a debtor. There is nothing in this record which supports a finding that CMSI owed, controlled, or held the power to vote 20 percent or more of the outstanding voting certificates of the Debtor. This Court therefore is satisfied that the Trustee cannot recover the amounts sought from McDermott or CMSI as set forth in Counts XX and XXI, respectfully.

With respect to the claims based on either Sections 548(a)(1) or 544(b) of the Code and FLA. STAT. 726.105(1), it is clear that "intent" to defraud is an indispensable element of a viable claim under these Sections. The determination of subjective intent of an actor to defraud is rarely, if ever, susceptible for determination based on the cold record. This determination must be made by a trier of fact who has the opportunity to observe the demeanor of the witness and also judge the creditability of the witness. There is no question that both the Defendants denied this element. It is well established that if the subjective intent in establishing a claim is an indispensable tabling of a claim, it is an indispensable element of a viable claim if it is improper to dispose of the same in a summary fashion and that issue has to be resolved by trial. This being the case, it is clear that the Motion from Summary Judgment directed to the claims for fraudulent transfers either based on the Bankruptcy Code or Florida Statutes cannot be granted and should be tried.

As noted earlier, both McDermott and CMSI also filed the Motion for Summary Judgment and/or Partial Summary Judgment (Doc. No. 103). The Defendants contend there are disputed facts concerning the claims of the Trustee based on the fraudulent avoidance Sections of the Bankruptcy Code § 548(a)(1)(A) and § 548(a)(1)(B), and the Trustee's Motion is not well taken and should be denied.

The Defendants also seek a determination of the claims asserted against them based on Section 544(b) of the Code and Section 726.105 of FLA. STAT., contending the Trustee cannot prevail because; (1) the case law relied on by the Trustee is not governed by the laws of Pennsylvania, which is the controlling law of the transaction under consideration; and (2) in any event, the facts necessary to resolve this matter are disputed, therefore, cannot be resolved without a trial.

Concerning the attacks of the Defendants on the claim of the Trustee based on Sections 548 and 544(b) of the Code, and FLA. STAT. §726.105, the Defendants contend there is no evidence to show that they did not receive their commission and investment payments for value in good faith. Section 548(a) (1) (A) of the Code is the actual fraudulent intent section and is silent as to any requirement for the Trustee to show lack of good faith. The intent of an actor who is charged with the receipt of the fruits of a fraudulent transfer is a matter of fact and cannot be resolved, and should not be resolved, by summary judgment for the simple reason that the trier of the facts must consider the behavior and the conduct and the demeanor of the witnesses. Furthermore, fraudulent intent can rarely, if ever, be proven by direct evidence and it must be determined from a totality, if there is one, of all the testimonial and documentary evidence. See In re Ste. Jan-Marie, Inc., 151 B.R. 984 (Bankr. S.D. Fla. 1993); In re Top Sport Distributors, Inc., 41 B.R. 235 (Bankr. S.D. Fla. 1984); In re Missionary Baptist Foundation of America, Inc., 24 B.R. 973 (Bankr. N.D. Tex. 1982).

The claim against McDermott set forth in Count IV seeks to recover damages based on Section 548(a)(1)(B)of the Code. This Section also deals with recovery of damages based on the theory of constructive fraud and provides in part:

> 11 U.S.C. §548
> (a)(1) The trustee may avoid any transfer . . . if the debtor voluntarily or involuntarily –
>
> (B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

While this section does not require proof of intent to defraud or proof of insolvency of the Debtor, or that as a result of the transfer the Debtor became insolvent, proof of either of these factors are indispensable for recovery.

To support this proposition the Defendants contend that this Court should disregard the testimony of the expert witness presented by the Trustee. They further contend that there is no documentary or other evidence to show that the Debtor owed Bart Thomas funds which, according to the Defendants, are the sole bases of the testimony of the expert. This Court is constrained to reject this proposition and is also satisfied that it is inappropriate to resolve this issue by way of summary judgment.

The same comments are equally applicable to the fraudulent transfer claims asserted by the Trustee based on of FLA. STAT. § 726.105. Concerning the Trustee's claims of negligence, fraud, misrepresentation, and breach of fiduciary duty, the Defendants contend that the claims of the Trustee are not controlled by the laws of Florida and, thus, are controlled by the laws of Pennsylvania, since the alleged torts had been committed in Pennsylvania. The Defendants cite no authority to support this proposition. This Court is satisfied that whether or not these claims are governed by the laws of Pennsylvania or Florida, this claim cannot be resolved by summary judgment because the necessary elements to establish such claims are fact intensive and must be resolved after trial.

This leaves for consideration the claims of the Defendants that the Trustee lacks standing because he has not suffered any injury and any such injury is not traceable to the unlawful conduct and the requested relief will not redress the injury. E. F. Hutton, Inc. v. Hadley, 901 F.2d 979 (11th Cir. 1990); SIPC v. Capital City Bank (In re Meridian Asset Management, Inc) 496 B.R. 243 (Bankr. N.D. Fla. 2003). This contention is based on the proposition urged by the Defendants that there is nothing in the record to establish any assignment obtained by SIPC or the Trustee from the investors who lost money in the Ponzi Scheme. This Court is satisfied this contention is without merit and the Defendant's Motion should be denied. The same comments are equally applicable to the Defendant's contention based on judicial estoppel and general estoppel.

CLAIM OF SET-OFF

The last matter that should be mentioned deals with the claims of the Defendants that they are entitled to a judgment with respect to their defense as a set-off. It is well established that a claim forming the basis of set-off right must arise from a transaction different from which the primary claim derives. See In re University Medical Center, 973 F.2d 1065, (3rd Cir. 1992); In re Davidovich, 901 F.2d 1533, (10th Cir. 1990); Lee v. Schweiker, 739 F.2d 870, (3rd Cir. 1984); In re B & L Oil Co., 782 F.2d 155, (10th Cir. 1986). The principal feature of a set-off claim is that the underlying debts of the parties be mutual, thus, each individual owes something to the other in the "same right and capacity." Norton Bankruptcy Law and Practice 2d, § 63. Thus, before this defense is available there must be two debts, one owed by the Defendants to the Plaintiff and another owed by the Plaintiff to the Defendants.

Even a cursory examination of the two claims, one of the Trustee against the Defendants and the other by the Defendants, totally lacks the required mutuality between the individuals. This is so because the claim of the Trustee is not asserted on behalf of the Debtor, but on behalf of SPIC. The claims of the Defendants are based on their claims that they were victims themselves of a fraudulent scheme of Zimmerman, thus, entitled to be reimbursed for their damages by SPIC. The difficulty with this proposition should be obvious when one considers that the Defendants did assert a right to be covered by their insurance and, therefore, should be treated the same as other customers for their losses. This claim of the Defendants has been previously considered by this Court and rejected. The Defendants challenged the ruling of this Court in the District Court, and in the Eleventh Circuit. This Court's Order sustaining the Trustee's Objection to the claims of the Defendants was affirmed in both forums. In sum, it

is evident that there is a total lack of mutuality and, therefore, the Defendants have no right to a set-off.

Regarding the Defendants Motion directed to preferential transfer claims under Section 547 of the Code in Counts XX and XXI, the Defendants Motions should be granted.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion for Summary Judgment be, and the same is hereby, denied as to the following counts:

Count III [Fraudulent Transfer, 11 U.S.C. § 548(a)(1)(A) --McDermott];

Count IV [Fraudulent Transfer, 11 U.S.C. § 548(a)(1)(B) -- McDermott];

Count V [Fraudulent Transfer, 11 U.S.C. § 548(a)(1)(A) -- CMSI];

Count VI [Fraudulent Transfer, 11 U.S.C. § 548(a)(1)(B) – CMSI];

Count XI [Fraudulent Transfer, 11 U.S.B § 544(b) and FLA. STAT. § 726.105(1)(a) – McDermott];

Count XII [Fraudulent Transfer, 11 U.S.B. § 544(b) and FLA. STAT. § 726.105(1)(b)(1) – McDermott];

Count XIII [Fraudulent Transfer, 11 U.S.B. § 544(b) and FLA. STAT. § 726.105(1)(b)(2) – McDermott];

Count XIV [Fraudulent Transfer, 11 U.S.B. § 544(b) and FLA. STAT. § 726.106(1) – McDermott];

Count XV [Fraudulent Transfer, 11 U.S.B § 544(b) and FLA. STAT. § 726.105(1)(a) – CMSI];

Count XVI [Fraudulent Transfer, 11 U.S.B. § 544(b) and FLA. STAT. § 726.105(1)(b)(1) – CMSI];

Count XVII [Fraudulent Transfer, 11 U.S.B. § 544(b) and FLA. STAT. § 726.105(1)(b)(2) – CMSI];

Count XVIII [Fraudulent Transfer, 11 U.S.B. § 544(b) and FLA. STAT. § 726.106(1)(b) – McDermott].

It is further

ORDERED, ADJUDGED AND DECREED that the Defendants' Motion for Partial Summary Judgment with respect to preferential transfer claims pursuant to 11 U.S.C. § 547 (b) of the Code in Counts XX and XXI be, and the same is hereby, granted, and said claims are dismissed with prejudice. It is further

ORDERED, ADJUDGED AND DECREED that the Defendants' Affirmative Defense of set-off is without merit and should be, and is hereby, stricken. It is further

ORDERED, ADJUDGED AND DECREED that a separate partial final judgment shall be entered in accordance with the foregoing. It is further

ORDERED, ADJUDGED AND DECREED that a pre-trial conference shall be scheduled before the undersigned on January 26, 2005, 1:30 p. m. at the Sam M. Gibbons United States Courthouse, Courtroom 9A, 801 N. Florida Avenue, Tampa, Florida, 33602, to prepare the remaining issues for trial.

DONE AND ORDERED at Tampa, Florida, on January 5, 2005.

/s/ Alexander L. Paskay
ALEXANDER L. PASKAY
U.S. Bankruptcy Judge